

Date: 09/30/97

Case No.: 96-INA-28

In the Matter of:

JAMES HANNA,  
Employer

On Behalf Of:

LATCHMI DEVI RATTAN,  
Alien

Appearance: Peter J. Lorme, Esq.  
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

### **DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien

will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On March 15, 1994, James Hanna ("Employer") filed an application for labor certification to enable Latchmi Devi Rattan ("Alien") to fill the position of Domestic Cook (AF 5-6). The job duties for the position are:

Plan/cook serve West Indian style meals in private home. Prepare all ingredients. Cook vegetables, meats, fish, breads, pastries and cakes. Clean kitchen and all cooking equipment.

The requirements for the position are two years of experience in the job offered or two years of experience in any cooking position involving West Indian cooking.

The CO issued a Notice of Findings on May 10, 1995 (AF 46-50), proposing to deny certification on the grounds that the Employer failed to establish that the job opportunity constitutes permanent, full-time employment. In addition, the CO found that the Employer failed to establish that several U.S. workers were rejected solely for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until June 14, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 31, 1995 (AF 51-74), the Employer contended that the job offer constitutes full-time employment. Specifically, the Employer stated that the cook will be required to prepare 15 meals per day and 75 meals per week. He further stated that the meals will be prepared for himself, his wife, and their three children. The Employer provided a daily schedule for the cook. Moreover, the Employer stated that the general household duties are performed by family members. Regarding the U.S. applicants, the Employer stated that one applicant did not have experience in West Indian cooking and one applicant failed to respond to the Employer's certified mail letter.

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on June 20, 1995 (AF 75-77), denying certification because the Employer failed to establish that the job opportunity represents full-time employment.

## Discussion

We are concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive, which does not appear to have been considered by the CO. The job requirements include two years of experience in the job duties of West Indian cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in West Indian cooking.

For this reason, we cannot conclude that the CO's determination is reasonable or supported by sufficient evidence in the record as a whole. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking West Indian foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

## ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

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RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.